IN THE MATTER OF AN ARBITRATION

BETWEEN:

Vale Canada Ltd

and

USW, Local 6500

(Grievances of French, Patterson & Veniot)

Before:	William Kaplan Sole Arbitrator

Appearances

For the Employer:	Steven Shamie Hicks Morley Barristers & Solicitors
For the Union:	Brian Shell Shell Lawyers Barristers & Solicitors

A hearing in this matter was held in Sudbury on August 17 & 20. September 4 & 5, October 16, November 29 & 30 and December 13, 2012 and in Toronto on May 11 & 12, 2013 and in Sudbury on July 18 and August 26, 2013.

Introduction

On January 22, 2010, Mike French, Jason Patterson and Patrick Veniot were terminated from employment. These terminations were among a number that took place during a lawful strike that began on July 13, 2009. Some of the background to that labour dispute is set out in an earlier interlocutory award between these parties released on July 25, 2012.

The grievors were terminated following an incident that took place on January 19, 2010 ("January 19th"). Each grievor received an identical termination letter:

> This letter will confirm that you are discharged from Vale Inco effective immediately.
>
> We have been made aware that on January 19th you participated in a vicious and brutal assault against an employee of Vale Inco. It is evident that you were engaged in a premeditated effort to harass and intimidate the employee and that your conduct, including the assault, was motivated by the employee's exercise of his lawful right to continue to work for our Company.
>
> We have zero tolerance for any behaviour that is threatening or violent. We have made our expectations in this regard known to the USW, Local 6500 and to all striking employees. We believe that you either knew or ought to have known that your actions were both threatening and violent in nature. Regardless of your criminal or civil liability, such behaviour represents a fundamental rejection of the principles and values of our Company and a complete repudiation of your ongoing obligations as an employee.

All three grievors were charged with harassment: *Criminal Code* (section 264(2)(d)). Mr. French was also charged with assault: *Criminal Code* (section 266). The charges proceeded before the Hon. Justice W.F. Fitzgerald in Sudbury on December 6 & 7, 2010. On January 31, 2011, judgment was rendered: Mr. French was convicted of assault. All three grievors were acquitted of harassment. The interlocutory award dealt with the evidentiary scope of the hearing on the merits given the factual findings of the trial judge. Once the scope issue was settled, the

case proceeded over the course of number of days in both Sudbury and Toronto. Final argument took place in Sudbury on August 26, 2013.

What needs to be determined, as the discharge letters makes very clear, is what occurred on January 19th, and whether the events of that day constitute just cause for termination. In the employer's view, they do, management taking the position, in summary, that the assault alone and the grievors' participation in it, justified termination. The employer further takes the position that the assault was premeditated making matters even worse and requiring the most serious of disciplinary sanctions. Moreover, this was not a case, in the employer's view, given the severity of the incident, and the fact that none of the grievors have sincerely or appropriately apologized for their misconduct at any time, to apply mitigating factors like long service.

For its part, the union takes the position, again in summary, that while Mr. French is deserving of some disciplinary sanction for his involvement in the assault, Messrs. Patterson and Veniot had nothing to do with it. In the union's view the evidence established that Messrs. Patterson and Veniot were innocent bystanders. In addition, there was no clear, cogent and compelling evidence of premeditation and, therefore, no basis to terminate these long-service employees. In these circumstances, the union asked that all three terminations be set aside, that a lengthy suspension be imposed in the case of Mr. French but otherwise, that the grievors be reinstated to employment without loss of service and seniority, together with full compensation minus any mitigation.

The Factual Background

While the issue to be determined is relatively straightforward – to repeat, what happened on January 19th and whether those events, including whether there was any premeditation, constitute just cause for termination – the contextual circumstances are more complicated. However, this background must necessarily be elaborated upon, at least somewhat, in order to place the events January 19th in both factual and legal context.

The parties were embroiled in a highly contentious labour dispute. The union had called a strike and by January it had been going on for some six months. Thousands of employees were out of work. Collective bargaining had ceased. For the first time ever, the employer made the decision to attempt smelting operations during a labour dispute. A private security firm ("AFI") was engaged to supplement Vale's security staff. It was known that some bargaining unit members had decided to exercise their legal right to return to work, and they were reporting along with replacement workers and contractors (together with non-striking employees represented by another USW local). Helicopters were used to transport some employees.

The three grievors were, of course, on strike. Mike French was a union activist, committeeman, and a long-service employee (19 years). Jason Patterson was a member of the local bargaining committee. He had just been appointed Treasurer of the local and was a long-service employee (16 years). Patrick Veniot was a well-known union leader who had held a number of important elected positions in the local and had been narrowly defeated for the local's presidency in the most

recent election. He was also a long-time employee (22 years). Todd Chretien was another long-service employee and member of the bargaining unit. He was an Acid Plant Operator who had exercised his legal right to return to work.

Todd Chretien Returns to Work

Acid Plant Operators perform critical tasks in the smelting operation. As established in the evidence of Operations Team Manager Tom Zarnetti, and as is generally well known, they are highly trained, they are indispensable to the operation and, for all practical purposes, they are irreplaceable. Mr. Zarnetti testified that had Mr. Chretien not returned to work, the employer could not have operated the acid plant and restarted the smelter. On the morning of January 19th it was evident from the smoke from the stack – visible in the community – that the employer had succeeded in resuming operations. This was made clear by the color of the smoke: there was "a significant difference in the smoke."

While Todd Chretien was not at work that day, he had earlier decided to cross the picket line. When the strike began, he succeeded in finding some work, but by late fall, with the construction season coming to an end, job opportunities dried up. In the meantime, Mr. Chretien needed money to live, and to pay child and spousal support. He also thought that the employer's offer was fair. And so he contacted the employer in late November 2009 and returned to work in mid-December. Not surprisingly, Mr. Chretien was called by striking friends and a union official in late December and asked whether he was crossing the picket line. He confirmed that he was. He was urged to reconsider his decision. Around

this time, a picture of Mr. Chretien, taken from his Facebook page, was copied, altered and posted on the local union's website (together with photographs of other returning to work employees).

Mr. Chretien is shown smiling. The word "SCAB" has been superimposed on his shirt and the text reads: "Todd Chretien (Current 6500 Member, Now VALE's New ACID PLANT Operator, his pictures are below. Todd Chretien was spoken to on Dec. 24th. He confirmed that he had started scabbing and plans to continue. He's a local 6500 member from the Acid Plant.)"

On or before January 8, 2010, Mr. Chretien's car, parked outside his apartment building located at 1536 Kelly Lake Road, was vandalized: "scab" had been spray painted on the car and its tires slashed/deflated. Mr. Chretien's spouse, Ty Cumming, who testified in these proceedings, discovered it in the morning when she was driving Mr. Chretien's daughter to school. A poster was placed on his car, and other cars in the lot, and was also glued to windows in the lobby. It had that same picture of Mr. Chretien that had been altered and posted on the union's website. It read:

Do you Know Me?

I'm Todd Chretien…….

I live in you're building and…

I'M A SCAB!!!

Both Vale Security and AFI were instructed by Vale Security Specialist Mike Neault to increase patrol frequency at the Chretien residence.

The Boxed-in Incident of January 14, 2010

Another striker, Brian Miller, employed since June 1996, testified. He had money issues – exacerbated by the strike – and matrimonial/custody problems. In December 2009, Mr. Miller informed his bank that he would be defaulting on his mortgage. Mr. Miller was an active participant on the picket line and came to know Mr. French. On January 14th, he was at the union hall. Mr. French, he testified, said, "lets go for a ride." Mr. Miller agreed to tag along to kill some time. This was the first, indeed, only time Mr. French invited Mr. Miller to go for a drive. Mr. Miller testified that they had no destination in mind as they set out in Mr. French's truck. Soon enough, however, they were at Mr. Chretien's residence, except Mr. Miller testified that he did not know that was where Mr. Chretien lived. He had heard that Mr. Chretien was crossing the picket line but did not know him or the details. He did know, however, that Mr. Chretien occupied a critical position. According to Mr. Miller, as he was driving around with Mr. French, he was telling Mr. French about his various financial problems including the fact that he would be shortly surrendering his house as he could not make the payments.

When they arrived at 1536 Kelly Lake Road (Mr. Chretien's address), Mr. Miller testified that he noticed that there was sign on the second story of the building indicating an apartment for rent. Mr. Miller asked Mr. French to pull in. It was a nice building, Mr. Miller recalled, and his sister lived, or had lived, nearby. Mr. Miller left the truck, holding a piece of paper and went to the lobby to look for further rental information. He did not observe, he testified, any posters in the

lobby. As he was searching for information, Mr. Miller noticed Mr. French waving and gesticulating in the cab of his truck.

Mr. Miller left the building and saw Mr. French pointing in the direction of an AFI vehicle. Mr. French told him that they were being followed by AFI. Mr. Miller got back in the truck and soon enough they "boxed in" the AFI vehicle. Messrs. French and Miller then approached the AFI vehicle and had an exchange that was recorded on video. Mr. French also called the police – who arrived in due course – complaining about being followed.

According to Mr. French, it was a complete coincidence that he and Mr. Miller ended up at Mr. Chretien's apartment building. As it happened, this was the only time Mr. Miller actually looked for an apartment. In April 2010, Mr. Miller surrendered the keys to his house and moved into his girlfriend's residence.

In addition to Messrs. Miller and French, Vale PSO Joanne Rheault testified about the "boxed in" incident. On January 14th, Ms. Rheault was on patrol and Mr. Chretien's residence was on her route. Together with her partner, Ms. Rheault drove by Mr. Chretien's residence. A short while later, she was directed by dispatch to return to the residence because there was a report that picketers had been seen. Upon returning, there was a discussion with Messrs. French and Miller who advised that they were searching for an apartment for Mr. Miller "who had lost his house, truck and wife." Ms. Rheault observed that there were no vacancy signs at 1536 Kelly Lake Road, although she did not note this in her written report, a failing which she attributed to inexperience. Messrs. French and

Miller also expressed dissatisfaction with having being followed by AFI. Accordingly, they had "boxed in" the AFI security vehicle and informed Ms. Rheault that they had also called the Sudbury police.

On January 15th, Mr. Chretien was contacted by Vale Security and was told that two strikers, Messrs. Miller and French, had been seen the previous day outside of his apartment building. Mr. Chretien did not know either Mr. French or Mr. Miller. He was further informed that Mr. Miller had entered the lobby holding a piece of paper, but exited empty handed. Mr. Chretien was at work. He contacted his spouse who reported that there was nothing in the mailbox but told him that she had earlier found another poster that had been left in the lobby. Ms. Cumming testified that she ripped it down and threw it out. (There were some minor inconsistencies in Mr. Chretien's and Ms. Cumming's accounts. However, they are of neither factual nor legal significance.)

A few days later, while being transported to work by an AFI official, Mr. Chretien asked some questions about the event. He learned that Mr. French drove a blue Toyota Tundra. At some point, Mr. Chretien learned that Mr. French claimed that Mr. Miller was in the building because he was looking to rent an apartment. On January 14th, according to Mr. Chretien, and as later confirmed to Mr. Chretien by his landlord Earl Swtizer, there were no vacancies in the building and no advertisements for current or future vacancies on the building or in front of it. This was also the evidence of Ms. Cumming.

Todd Chretien is Assaulted

On January 19th, Mr. Chretien was not at work. He is a runner, and was out on a 10km run. He was dressed in black, with dark sunglasses and a black toque. He left his house at 12.26 pm, confirmed by his GPS watch. At 1.01 pm, just outside of 1288 Southview Drive, which is close to Mr. Chretien's residence, Mr. Chretien, was running south toward his home. A blue Toyota Tundra was driving north and passed him. Mr. Chretien was aware that it was a blue Toyota Tundra that had been seen by AFI outside his apartment building a few days earlier. The truck stopped, turned around, and now traveling south, pulled over to the side of the road, ahead of Mr. Chretien and on his side of the road. Mr. Chretien continued running toward the truck. Mr. French exited the truck first, followed by Messrs. Patterson and Veniot.

According to Mr. Chretien, all three men were speaking to him, loudly, repeatedly calling him "a fucking scab" and saying "look at what you are doing to us." At some point, after he was hit by Mr. French, Mr. Chretien was on the ground. While Mr. French perpetrated the assault, neither Mr. Veniot nor Mr. Patterson did or said anything to stop it or to assist him. Mr. Chretien, concerned that one or more of the grievors might "jump" him, made no move to get up. Mr. Chretien estimated that Messrs. Patterson and Veniot were a minimum of eight feet away at the time. Mr. Chretien did not agree in cross-examination, that Messrs. Patterson and Veniot appeared calm and relaxed. Quite the contrary: "they were yelling at me." Likewise, Mr. Chretien did not observe that Mr. Veniot was on the telephone during the incident. After approximately six minutes, the incident ended and the trio returned to the truck.

Mr. Chretien made a mental note of the license plate number and returned home. The police were called and a statement provided. Mr. Chretien sought medical attention at a walk-in clinic. He had suffered minor injuries and missed no work. Messrs. Patterson and Veniot never apologized for the incident. Mr. French was required, as a condition of his probation order, "to write a letter of apology to Todd Chretien":

> I am writing to you to apologize for what happened last year. I'm sorry I pulled my truck over. It was a bad decision. I was very frustrated at the time because of the long strike. I was angry and disappointed that you had decided to cross the picket line. I felt and seen that during the strike, the corporation was ruining our community and hurting families and those crossing the line were helping the corporation do this. I did not put pictures up in your building nor did the vandalize your car. I certainly had no desire to make you feel as though your family was in danger.

Mr. Chretien did not consider that this was a sincere apology as, he testified, the expression of regret was "for pulling over his truck."

One week after the assault, Vale published "An Open Letter to the Community of Sudbury" in the *Sudbury Star* and elsewhere. It read:

> For more than six months now, Vale has found itself embroiled in a labour dispute in Sudbury. As we know too well, no one wins during a strike – not the company, not the community and certainly not our striking employees.
>
> Unfortunately, events in recent months have demonstrated an uglier side to these disputes. Acts of intimidation, violence and vandalism have become commonplace. These are acts that none of us can ignore or condone.
>
> Death threats, terrorizing and threatening spouses and children, damage to private homes and vehicles, vandalism of public and private property, spikes on public roadways, and now, an apparently premeditated three-on-one assault on an individual who was doing nothing more than jogging in broad daylight on our community's streets.
>
> Does anyone really believe observance of the law should be suspended during a strike?
>
> Websites and public statements that elicit violent and intimidating behaviour have no place in this dispute or in this community.

At Vale, we believe in preserving the ability of all concerned to exercise their legal rights in a safe and secure manner.

The USW has a legal right to strike.

Employees have a legal right to report to work.

And all of us have every right to expect and demand observance of the law.

More Background on the Events of January 19th

Around noon on January 19th, the grievors were at the USW's temporary hall at 128 Pine Street ("Pine Street"). They had another meeting scheduled at the USW hall at 66 Brady Street ("Brady Street") located a very short drive away. This meeting was with Mr. Rick Bertrand, the local union vice-president (and now union president) and other union leaders. Mr. Bertrand was responsible for the day-to-day administration of the strike.

Morale, Mr. Bertrand testified, was especially low. While only a handful of union members had crossed the picket line, there had been no collective bargaining for months. That morning, Mr. Bertrand noticed smoke was coming out of the stack and so he realized, as did other strikers, that the employer had succeeded in resuming smelting operations. Mr. Bertrand decided to call a 1:00 pm meeting to discuss this development on Brady Street. The grievors asked Mr. Bertrand if he wanted to drive over to Brady Street with them in Mr. French's truck. Mr. Bertrand said no as he had another engagement scheduled at 2:00 pm. Mr. Bertrand left Pine Street around 12:45 pm.

It was clear, given this commitment, the meeting needed to start as scheduled. Mr. French testified, however, that because everyone was on strike, schedules

were not being strictly adhered to. On the other hand, he was aware that because Mr. Bertrand had another engagement later in the day, "the meeting was supposed to start at 1:00 pm."

Considerable evidence was tendered by both the union and the employer about the exact time the grievors left Pine Street. It is uncontradicted, however, that they were expected at 1.00 pm at Brady Street. A company witness, Maintenance Systems Superintendent Bob Landry, testified that he saw the grievors in the Pine Street parking lot. The Pine Street hall shares a parking lot with a number of commercial establishments including one that Mr. Landry was visiting. He testified that he said hello to the grievors who were sitting in a truck and that when he left the parking lot at 12.46 pm, the grievors were still there. Mr. Landry reported these events, and made written notes because he had been informed about Mr. French having recently been seen outside of Mr. Chretien's apartment building. He had also viewed the AFI video footage of the "boxed in" incident.

On the other hand, Mr. French, Mr. Patterson and Mr. Veniot testified that Mr. Landry left the parking lot before they did. The established fact is that the grievors, and Mr. Bertrand and the other union leaders, all left Pine Street around the same time to proceed to the 1:00 pm meeting on Brady Street. Everyone else went directly to that meeting. Everyone except the grievors.

According to Mr. Patterson, as they left Pine Street Mr. French announced that he was hungry. Mr. French testified, however "we were all hungry." They then traveled to Cara's Convenience, a well-known sandwich emporium south of both

Pine and Brady. After they picked up their food, Mr. French inquired whether Messrs. Patterson and Veniot wished to see the location of the "boxed in" incident. Around this time, they noticed the stack and could see smoke. Mr. Patterson testified that they "cursed a bit." They then drove to 1536 Kelly Lake Road – without knowing, all three testified – that this was where Mr. Chretien lived. Mr. French showed Messrs. Patterson and Veniot the location of the "boxed in" incident and then proceeded north toward the French residence to go to the washroom and pick up some cigarettes. The plan was to then make their way to Brady Street. According to Mr. Veniot, he said several times to Mr. French, "where are you going, we need to get to the meeting, lots of people are waiting." It was after viewing the location of the "boxed in" incident and on their way to Mr. French's residence that the encounter with Mr. Chretien took place.

According to Mr. French, and generally confirmed by Messrs. Patterson and Veniot, the trio was driving north when Mr. French saw someone: "I said, that looks like Todd Chretien." Mr. French had posters of strikebreakers in his car: "know your scabs" and turned his truck around. Messrs. Patterson and Veniot were, he testified, "laughing." Mr. Veniot said it was not "him." Mr. Patterson was sitting in the back but, looking at the picture, said, "I don't think it's him." Mr. Patterson did not know Mr. Chretien. In fact, Mr. Patterson had not even heard that Mr. Chretien's car had been vandalized. Mr. Patterson testified that he also did not know that Mr. Chretien occupied a critical position.

Nevertheless, Mr. French thought it might be Mr. Chretien, although the person in question was some distance away – when Mr. Veniot testified, he said that the

jogger was some two hundred feet away – and all dressed in black. Mr. French wanted to find out if it was him – his "spider senses" suggested that it was and so he turned the truck around and drove past Mr. Chretien (estimates on the distance vary) before stopping it on Mr. Chretien's side of the road.

It was a coincidence, Mr. French testified, that the encounter took place: "I wasn't hunting Todd Chretien. I did not want to hunt this fucker down." It was not, he added, "a scab hunt, I am not a scab hunter." He then got out and, he testified, waited for Mr. Chretien to approach. Mr. French wished to have a discussion with Mr. Chretien about the effect of his actions on the strikers and on the community. Mr. Patterson testified that Mr. French asked, as the jogger approached, and while holding out the picture, "Excuse me, is this you?" Mr. Patterson also testified that Mr. Chretien then, according to Mr. Patterson, tried to swipe the picture from Mr. French, or threw or a punch, he was not sure. Mr. Chretien also said "Hey Mike," and "Fuck off, Mike." Mr. Chretien definitely took the "first swing." If Mr. Chretien had not made the first move, only a conversation would have occurred. However, after Mr. Chretien said, "Hey Mike," the melee ensued. Mr. Veniot testified along similar lines.

According to Mr. Patterson, at some point he heard Mr. Chretien say, "It's three on one." Mr. Patterson corrected him by saying, although not too loudly, "its not three on one, just one person hitting you." Mr. Patterson did not know if Mr. Chretien heard him or not. Mr. Patterson also testified that because of his involvement in a very similar matter when he was eighteen years old that led to a criminal conviction, he deliberately did not get involved. He knew from that

experience that people who did not participate did not end up getting into trouble. So he stood there with his hands in his pockets. When Mr. Chretien fell to the ground, Mr. Patterson testified that he said "don't kick him." Mr. Patterson heard "a lot" of yelling. Mr. Patterson did not say anything else himself nor did he hear Mr. Veniot say anything. When the incident ended, Mr. Patterson testified that Mr. French offered to help Mr. Chretien up and then "Mike said, 'that's your last shift.'"

According to Mr. Patterson, he was sitting in the back seat of the truck and had nothing to do with the decision to view the location of the "boxed in" incident, or the direction taken, or the decision to stop. "We go," he testified, "for rides to shoot the breeze all of the time." He had joined Messrs. French and Veniot, sharing a ride to save gas money. He never told Mr. French to stop the assault because he had no idea what was going on.

Mr. Patterson was shocked when he was charged with criminal harassment: "I did nothing to deserve what I have been put through in this proceeding." When Mr. Chretien testified that Mr. Patterson called him a "fucking scab" he was lying. Mr. Veniot made the same assertion: he never called Mr. Chretien a "fucking scab," in a menacing tone or otherwise. Mr. Chretien was either lying or confused. Mr. Veniot was, he insisted, telling the truth when he said that he was speaking on the telephone during the incident. He did not mention this during the criminal proceeding. The phone did not ring; it vibrated. In fact, Mr. Veniot did not recall Mr. French calling Mr. Chretien a "fucking scab" more than once. He was busy on the telephone speaking with Mr. Bertrand telling him, "We will

get there when we get there." Mr. Veniot did hear Mr. Patterson say "Don't kick him," although he did not think that anyone else heard this, "just me."

While Mr. Veniot testified that he had nothing to do with the assault, after Mr. Chretien declined Mr. French's offer of assistance to get to his feet, Mr. Veniot told him, "Todd, it is not right what you are doing." Mr. Veniot said this very calmly. Mr. Veniot described attempting to de-escalate the situation by guiding Mr. French back to his truck. When the three grievors got back in, he felt sick to his stomach as he knew that the incident had put them in a compromising position. In Mr. Veniot's view, he was the victim, so too were the other grievors and Mr. Chretien; they were all used by the company as a part of a strategy to inflate the situation and deflate the union. Mr. Veniot testified that he was "an innocent victim." He would welcome an opportunity to sit down with Mr. Chretien and have a discussion.

The grievors agreed that Mr. Chretien bore responsibility for the incident. According to Mr. French, Mr. Chretien: "could have easily avoided me, Todd Chretien could have avoided this whole incident." Mr. French agreed, however, that neither of the other grievors told him to stop the altercation or moved to assist Mr. Chretien. When they testified, the other grievors also sought to deflect primary responsibility for the assault to Mr. Chretien and rejected the suggestion that they were, in fact, the ones responsible for the events of January 19th.

Mr. Bertrand estimated that after leaving Pine Street around 12:45 pm, it took approximately 7-10 minutes to drive to Brady Street. Around 1:10 to 1:15 pm, he

telephoned Mr. Veniot and asked where he was. Mr. Veniot told him that they were at Cara's Convenience. (Mr. Veniot however testified that Mr. Bertrand was mistaken about this.) Mr. Bertrand then said "we need to get this meeting going." After waiting a further fifteen minutes or so for the grievors to appear, Mr. Bertrand called again. During this call, Mr. Veniot told Mr. Bertrand that Mr. French had been in a confrontation and that he would get back to him. Sometime thereafter, Mr. Bertrand made a third call and this time he was informed that the three grievors were on their way. When they finally did arrive, Mr. Bertrand could only speak briefly with them as he had to leave for his 2:00 pm appointment. However, in this brief conversation, Mr. Bertrand testified that Mr. Veniot told him that they were driving along when Mr. French pulled over and walked over to a person, and showed a picture to him. Mr. Veniot told Mr. Bertrand that Mr. Chretien swung at Mr. French and that Mr. French blocked this punch with his hand, hurting his thumb.

After the assault, the three men drove north to Mr. French's residence. Once they got there, they noticed a police car in the driveway. Mr. French then drove Messrs. Patterson and Veniot to Brady Street. Later that day, he turned himself into the police. Mr. French knew that he would be receiving legal representation from the union. However, he was asked to give a statement and eventually made contact with a lawyer whose name appeared on a list and who, according to Mr. French, advised him to proceed. The video of the police statement was introduced into evidence. Mr. French testified that he had never been in trouble with the law before, and felt nervous, scared and alone. Some of the things he told the police were inaccurate and – such as that they stopped at Tim's not

Cara's Convenience – while the omission of other things – such as that he was taking the other grievors to see the location of the "boxed in" incident could be explained by the stressful circumstances.

When he told the police, in another example, that he did not know Mr. Chretien, he meant that he did not personally know him, which was true as he had never met him or previously had a conversation with him. He did know who he was, however. When various inconsistencies in his evidence during the criminal proceedings and this one were brought to Mr. French's attention during cross-examination, he explained that he may have been mistaken when he testified one way in one proceeding and another in this one. He definitely "knew at the time that Todd was a scab." He also knew that Mr. Chretien was an Acid Plant Operator and that this role was critical to restarting the smelter. In fact, Mr. French had a picture of Mr. Chretien in his truck that he took with him when he exited the vehicle and approached Mr. Chretien. It was, however, Mr. French testified, a complete coincidence that the location of the "boxed in" incident was immediately adjacent to Mr. Chretien's apartment – he insisted that he had no idea where Mr. Chretien lived – and it was another coincidence that he ran into Mr. Chretien after showing the other grievors the location of that incident. Messrs. Patterson and Veniot confirmed the coincidental nature of the January 19th encounter.

Mr. French testified that he had nothing to do with vandalizing Mr. Chretien's car or with leaving posters in his lobby. How could he? He did not even know where Mr. Chretien lived. He regrets his involvement in the January 19th

incident, its effects on the other grievors, himself and his family. He misses his job and would like to return to it. On January 20th, Mr. French attended a union meeting. He described the events of the previous day and was roundly applauded receiving a standing ovation. Mr. Patterson testified that Mr. French told the crowd: "I'm the one who hit that fucking scab." Mr. Patterson joined in the ovation. It was, Mr. Miller testified, a "boost in morale."

The Decision to Terminate

Jennifer Bagley, a HR Business Partner, testified. She prepared most of the "Peer Review Summary" which is the management tool used to consider and decide on discipline including termination. Ms. Bagley did not, however, make the recommendations. They were arrived at following discussions/meetings with more senior members of management in a process Ms. Bagley described, albeit with some difficulty in recalling many of the details, a circumstance that she attributed to the passage of time. Kelly Strong, the General Manager, Mines and Mill, expanded somewhat upon this process in his evidence.

In any event, a meeting was held on January 21, 2010. Prior to the meeting, the grievors were contacted and notes/transcripts taken of these conversations. For a number of reasons, the union objected to the introduction into evidence of these documents. After considering the positions of the parties, these documents were introduced subject to submissions on weight. It is hardly surprising that the three grievors, having been criminally charged, refused to answer most questions. (Mr. Paterson, however, did indicate that he had nothing to do with the incident and was just "standing there.")

A number of managers were present at the Peer Review Meeting, including Mr. Strong, and the document Ms. Bagley prepared was considered:

On January 19th at approx. 1:20 pm, Mike Neault received a call from Todd Chretien. He informed Mike that he had just been "clocked by a picketer." He was running in the Robinson area and a truck (later identified as Mike French's truck) pulled up and stopped a few houses in front of him. Mike French got out and came towards Todd with a paper in his hand which had a picture of Todd holding a sign with a caption that indicated that he was a scab. Mike started speaking to Todd who attempted to ignore him. Mike then started kicking Todd, Pat Veniot and Jason Patterson got out of the truck and started yelling at Todd along with Mike. Mike then punched Todd on the right side of his head and Todd fell to the ground and injured his left shoulder. There was an exchange of words. Todd then ran home and called the police.

Mike's comments to Todd included: "What are you doing to us? You're screwing us. Fucking scab." Pat and Jason were also called Todd a "fucking scab".

The Peer Review Summary observed that all three of the grievors had lengthy service. While it correctly identified the criminal charges that had been laid against Mr. French, it incorrectly stated that Messrs. Patterson and Veniot were charged with "aggravated assault," while correctly stating that they were to be charged with "criminal harassment." According to Ms. Bagley and Mr. Strong, there was an opportunity for full discussion, for questions and for answers, and supplementary documents were available for consideration if requested. The Peer Review Summary contained the following recommendations.

Recommendation: Mike should be discharged. Mike is currently on a step 4 which was issued to him on March 26, 2009. Regardless, the act above without the presence of mitigating factors would constitute discharge for cause.
Recommendation: Pat should be discharged. The act alone without the presence of mitigating factors would constitute discharge for cause.
Recommendation: Jason should be discharged. He did not see anything wrong with standing beside Pat while watching Todd being assaulted by Mike. The act alone without the presence of mitigating factors would constitute discharge for cause.

Because the terminations took place during a strike, Ms. Bagley did not believe that these decisions could be referred to arbitration. At some point, Ms. Bagley became aware that they might be referred to arbitration by the OLRB.

Under cross-examination, Ms. Bagley did not recall whether there was any discussion about deferring action until the criminal charges were disposed of. Ms. Bagley testified that there was a general consensus that sufficient misconduct had been established to justify termination. Ms. Bagley drafted the termination letters concluding, among other things, that the actions in question were premeditated in part because of Mr. French's previous attendance at the Chretien residence, because all three had been seen at the union hall just prior to the incident, and because Mr. French had a picture of Mr. Chretien in his truck which he took with him when he, Mr. French, perpetrated the assault. While Ms. Bagley was aware that Messrs. Veniot and Patterson had not assaulted Mr. Chretien, she testified that it was her view, and that of the group of senior managers looking at the Peer Review Report, that the nature of their participation in the incident justified termination in and of itself: "Pat and Jason were also calling Todd a 'fucking scab'".

Similarly, Mr. Strong testified that, in his view, the incident was premeditated. Mr. French had been targeting Mr. Chretien – the "boxed in" incident was evidence of that and the explanation that Mr. French provided for his presence at the Chretien residence was not believable. More importantly, Mr. French had, within days of that "coincidence" in another coincidence perpetrated an unprovoked "physical assault", while Messrs. Patterson and Veniot had "verbally assaulted" Mr. Chretien and, as importantly, did nothing to stop or dissuade Mr. French. The fact that the three grievors were union leaders was also considered as part of the decision.

While it was true enough that in many other cases the time between an incident and the convening of a peer review would be measured in weeks if not months, in this case, the incident was brazen, it had taken place in broad daylight, the perpetrators were clearly identified, and while Mr. Strong was not involved in the scheduling of the meeting, there was no basis for delay. Messrs. Patterson and Veniot had clean disciplinary records, and all three had long service, these mitigating factors were insufficient to mitigate the discharge given the severity of the misconduct. Very simply, in Mr. Strong's view, Mr. Chretien's account was completely believable. Even though there might have been a mistake about who was charged with what, the basis of the termination decision was the participation of the three grievors in the incident: "they were there – they got out of the car." And, Mr. Strong added, they said what they said and made no effort to stop the assault. The information from Mr. Chretien was compelling and completely believable. There was no need, in these circumstances, to suspend the grievors or take some other steps pending further investigation.

Employer Argument

In the company's submission, it had just cause to terminate the grievors. In summary, the employer was justified in terminating Mr. French because he assaulted a fellow employee exercising his legal right to return to work. The attack on Mr. Chretien was premeditated. He was untruthful at the arbitration. And there were no mitigating factors that might be applied to reduce the penalty notwithstanding Mr. French's lengthy service. With respect to Messrs. Patterson and Veniot, the employer argued that they had participated in the assault by yelling at Mr. Chretien, they took no steps to end it, they were untruthful at the

arbitration, and the assault was premeditated. As was the case with Mr. French, the employer took the position that notwithstanding both grievors' lengthy service, this was not an appropriate case to reduce the penalty. The employer emphasized that there has been no expression of remorse by any of the grievors. Instead, the grievors continue to point their finger at Mr. Chretien and the employer.

The facts in this case, employer counsel observed, were unassailable. Mr. French committed an assault and was criminally charged and convicted for doing so. He assaulted Mr. Chretien for exercising his legal right to return to work. The conviction was dispositive. Messrs. Patterson and Veniot, as was established in these proceedings, committed a verbal assault on Mr. Chretien, repeatedly calling him "a fucking scab." Their misconduct was exacerbated by the fact that neither of them did anything to prevent the assault from occurring, or to stop it once it started. By yelling at Mr. Chretien after he had been hit and was down on the ground. Messrs. Patterson and Veniot made it clear that they were participating in the assault.

It was three against one. There were no innocent bystanders. The very fact that Messrs. Patterson and Veniot joined in the name-calling and taunting made a bad situation even worse. While it was true that all three grievors had long service, it was also true that none of them accepted responsibility for their misconduct or demonstrated genuine remorse. It was noteworthy that they all played important roles in the labour dispute. The three men saw the smoke coming from the stack on January 19th and decided to do something about it. In the employer's

submission, the participation of the three grievors in the assault – employee on employee violence is the most serious of workplace offences – in and of itself, established just cause for termination. And this was the most serious offence imaginable because there was no provocation. It was not a momentary flare up, which was considered a mitigating factor in some of the authorities. The assault was premeditated and executed because Mr. Chretien had exercised his legal right to return to work.

Mr. Chretien was a key employee and the union and its leadership knew as much. It was not a coincidence that the assault took place on the very day that the smelter resumed operations. The evidence further and independently established that the assault was premeditated. Why, employer counsel asked, did Mr. French have a poster of Mr. Chretien in his car? The answer, the employer suggested was because he was looking for him. The poster was for identification purposes. There was evidence of premeditation given the route that they took arriving close by Mr. Chretien's home when they were all expected at a meeting that was to have begun at the exact same time that Mr. French assaulted Mr. Chretien on the other side of town.

Mr. Chretien's residence, it was worth emphasizing, was in the exact opposite direction of Brady Street. The explanation that Mr. French was taking the grievors to see the location of the "boxed in" incident was never mentioned at the time, and only surfaced during the criminal proceedings when the grievors had to explain why they were nowhere near where they were supposed to be.

In determining whether this was an appropriate case for reinstatement, it was important to bear in mind that none of the grievors were truthful when they testified. Mr. French claimed that he had no idea where Mr. Chretien lived. Mr. French, employer counsel observed, would have us believe that when he was off on his January 14th pleasure drive with Mr. Miller, they just happened to arrive at Mr. Chretien's apartment building. Of all of the apartments in Sudbury, they ended up there. While the weight of the evidence was that there was no apartment for rent, both Mr. Miller and Mr. French claimed that there was, explaining both why they ended up at Mr. Chretien's residence and Mr. Miller's presence in the lobby.

The fact was, however, that there was no apartment for rent: this was the evidence of Mr. Chretien, Ms. Cumming and Ms. Reheault. It was obvious, the employer argued, that Mr. French knew exactly where Mr. Chretien lived, that he drove Mr. Miller there with a purpose in mind: to place more posters in the lobby. When AFI happened upon the scene, Mr. French boxed them in and called the police. But to claim he had no idea that this was the residence of a key strikebreaking employee strained credulity, the employer argued, to the breaking point.

Mr. Miller was seen going into the lobby of Mr. Chretien's building with a piece of paper and coming out without one on the very day that one of the "scab" posters was left behind. What was Mr. Miller doing in the lobby if there was no apartment for rent? While the identity of those responsible for vandalizing Mr. Chretien's car was not known, the fact that Mr. Chretien was returning to work

was hardly a secret. He was telephoned by union members. His car was vandalized. His picture was posted on the official union website as well as on a supporters Facebook page. Posters were plastered on his car and his apartment lobby. Everyone knew how important he was and clearly some people knew where he lived. In this context, Mr. Miller's explanation, and that of Mr. French, made no sense, especially given that there was no apartment for rent in Mr. Chretien's building. It was significant that Mr. Miller never ever looked for another apartment again. Months later he moved in with his girlfriend. For Mr. French to claim in these proceedings that he had no idea where Mr. Chretien lived was ludicrous.

Unfortunately, Mr. French's dishonesty, the employer argued, extended beyond this false claim. On January 19th, hours after he assaulted Mr. Chretien, Mr. French was interviewed by the police. At that time, Mr. French claimed, after leaving Pine Street, that he drove, along with Messrs. Patterson and Veniot, to Tim's. In his evidence in these proceedings, Mr. French admitted that this was not true. More importantly, when interviewed by the police, Mr. French made no mention of taking the other two grievors to see the location of the "boxed in" incident. That explanation was first proffered during the criminal trial, and repeated in this arbitration. The truth was that Mr. French and Messrs. Patterson and Veniot needed to explain what they were doing so close to Mr. Chretien's apartment on January 19th. That is why the three of them made up the story of going to look at the location of the "boxed in" incident.

The only conclusion that could be drawn was that all three grievors concocted the story to explain their presence so close to Mr. Chretien's residence. They fabricated the story to conceal the truth: that they were out looking for Mr. Chretien. Mr. French must have known that Mr. Chretien was a jogger. How else could he have spotted him from 200 feet away – this was the evidence of Mr. Veniot – when Mr. Chretien was dressed in black, wore a black toque and sunglasses? The only way they could have spotted him, the employer suggested was because they knew he was a runner and had reason to believe that he was out for a run. Mr. French answered this question by referring to his "spider senses." The employer suggested an alternative explanation: that Mr. French knew that Mr. Chretien was a jogger, was possibly tipped off that he had gone out for a run, and with the other grievors in tow, the three went looking for him.

The grievors, now quite late for their meeting, did not keep going when they passed the man that Mr. French believed to be Mr. Chretien. They turned around and drove back. They parked in front of him. They got out of their truck. Mr. French assaulted him. At no point did Messrs. Patterson or Veniot tell Mr. French to keep driving. Instead, they exited the truck and joined in, taunting Mr. Chretien after Mr. French assaulted him and he fell to the ground.

Mr. French's suggestion that Mr. Chretien was the author of his own misfortune was contrary to the finding of the judge who determined that it was Mr. French who committed the assault. There was no evidence that the assault was in any way provoked. Mr. French was dishonest when he testified that Messrs. Patterson and Veniot said nothing during the assault. Mr. Chretien's evidence

was clear and convincing: both Messrs. Patterson and Veniot repeatedly called him a "fucking scab." Mr. French had, in fact, shown his true colours when he testified that he did not want to "hurt that fucker." The next day, after reporting these events at a union meeting: "I am the one who hit that fucking scab," Mr. French received a standing ovation. Mr. French's apology was court ordered but, even so, completely insincere. There was no contrition. There was no acceptance of responsibility. There was the proven assault. There was premeditation. There was no remorse. And, in management's view, there was no basis for reinstatement. The employer asked that Mr. French's grievance be dismissed.

Turning next to Mr. Patterson, the employer argued that in his case just cause had also been established. The fact was that Mr. Patterson called Mr. Chretien a "fucking scab" on numerous occasions during the assault. That was the believable evidence of Mr. Chretien. The three grievors left the parking lot on Pine Street sometime after 12:46 pm. That was Mr. Landry's evidence and it was not challenged by the union when Mr. Landry testified. The assault took place just after 1:00 pm. In the meantime, the grievors supposedly left Pine Street some time after 12:46 pm, made their way to Cara's Convenience, picked up sandwiches and then visited the location of the "blocked in" incident, before beginning their trip north to Brady Street with a stop planned at Mr. French's house. There was no part of this story that made any sense. In the meantime, they were all expected at a meeting beginning at 1:00 pm. Not only were they expected, Mr. Bertrand called them three times asking where they were.

January 19th was an especially important day because the employer had succeeded in resuming smelting operations. The union knew this, that was amply demonstrated in the evidence. The grievors also all knew this, again amply demonstrated in the evidence, and by the special meeting called at 1:00 pm on Brady Street to discuss it. This meeting was to start promptly as all of the grievors knew that Mr. Bertrand had another engagement. If there was any ambiguity about this, Mr. Bertrand made it clear that the grievors were expected, and late, by his repeated telephone calls inquiring where they were. The grievors were instead, the employer argued, out looking for Mr. Chretien.

Mr. Patterson was part and parcel of this. While he denied anything other than being in the wrong place at the wrong time, that was not, in management's submission, persuasive or truthful. He got in the truck. He went along for the ride. He got out of the truck when he knew Mr. French intended to confront Mr. Chretien. He joined in by repeatedly taunting Mr. Chretien. He did nothing to stop the assault. He claimed in his evidence in these proceedings that he said "Don't kick him," but he never said anything like that during the criminal trial. Other aspects of his evidence were equally incredible. At one point, he testified that he did not know that Mr. Chretien was crossing the picket line. At another point, he conceded that he did know that Mr. Chretien was crossing the line. He asserted that he had no idea that Mr. Chretien's car had been vandalized, and even though he was a union leader involved in the strike, he insisted that he never looked at the union's website and saw the picture that had been posted of Mr. Chretien. Mr. Patterson further claimed not to know that Mr. Chretien

occupied a key position, even though Mr. Patterson had previously worked nearby.

As was the case with Mr. French, the employer argued that Mr. Patterson completely contrived visiting the location of the "boxed in" incident to explain his presence near the Chretien apartment building and to provide a refutation to the assertion of premeditation. The grievors had no reason to be anywhere near the Chretien residence. Even if they were believed that they went to Cara's Convenience after they left Pine Street, they should have exited and turned north to Brady Street. Instead, now late, or about to be late for their meeting, they turned south toward the Chretien residence. Even though Mr. Bertrand and the others were waiting for them. Even though Mr. Bertrand testified that he called and asked where they were. It was instructive, the employer argued, that when asked about the incident the next day by a company representative, Mr. Patterson testified that he was on his way to the union hall.

Anyone looking at a map, and one was introduced into evidence and now referred to by employer counsel, could see that it was crystal clear that the grievors were traveling in the exact opposite direction of the union hall, with little or no time to spare to get there. The conclusion was, in management's view, inescapable and inevitable that Mr. Patterson and the other grievors planned their assault and were out looking for Mr. Chretien. It was only a year or so later when facing their criminal charges did they all came up with their story about their outing to look at the location of the "boxed in" incident.

In the employer's view, the evidence proved that Mr. Patterson participated in the assault. He verbally taunted Mr. Chretien for exercising his legal right to return to work. He did nothing to help Mr. Chretien. In fact, the verbal taunting exacerbated the situation. Mr. Patterson made up the claim that he said, "don't kick him." Mr. Patterson had ample opportunity to testify what happened during the criminal proceeding but never mentioned that. He was not an innocent bystander but a participant, and he participated not just in the assault but also in the fabrication of the claim that they were visiting the location of the "boxed in" incident. While Mr. Patterson had long service, he also had an obligation to be truthful. He was not. There were no mitigating factors present in this case deserving of a reduction in the penalty. Mr. Patterson could have, but did not, told Mr. French to stop. He never did as he was involved from the beginning to the end. The employer asked that Mr. Patterson's termination be upheld.

Turning to Mr. Veniot, the employer repeated many of the same points raised earlier with respect to Messrs. French and Patterson about timing, about premeditation, about involvement in the incident, and about untruthfulness in these proceedings. In the case of Mr. Veniot, the evidence established that he was untruthful on multiple occasions. He testified, for example, that Mr. Bertrand called him when he was at Cara's Convenience. Mr. Bertrand testified that his first call to the grievors came around 1:10 and 1:15 pm. There could be no question but that this call came after the assault. The grievors testified that they went to Cara's Convenience and then toured the location of the "boxed in" incident before the encounter with Mr. Chretien took place. There was no

scenario in which that evidence could be accurate, particularly if the evidence of Mr. Landry was accepted that they were still at the parking lot at 12:46 pm. Mr. Landry's evidence was, of course, buttressed by the evidence of Mr. Bertrand. He testified about when his first call to the grievors occurred: it was at or around or just after the time of the assault. Mr. Veniot was completely untruthful in his chronology.

Mr. Veniot denied calling Mr. Chretien a "fucking scab." He claimed that he did not know that Mr. Chretien was an Acid Plant Operator. He claimed to have missed most of the incident as he was talking on the telephone. He participated in concocting the story of visiting the location of the "boxed in" incident to explain why he was so close to the Chretien residence when he should have been at the union hall for a meeting scheduled to begin promptly at 1:00 pm. Mr. Veniot's evidence that he was very calm during the incident, telling Mr. Chretien that he had to reconsider what he was doing, was at complete odds with Mr. Chretien's testimony and, the employer suggested, reality. Quite clearly, Mr. Veniot never told Mr. French not to get out of the truck. He never told Mr. French to step away. He never did anything to ameliorate the situation. What he did do was repeatedly call Mr. Chretien a "fucking scab." He even claimed in his evidence that Mr. Chretien was somehow responsible for the incident. All of the evidence of premeditation and participation applied equally to Mr. Veniot. This was a person who has shown no remorse, and taken no responsibility for the events in question.

Making matters even worse, in the employer's view, was Mr. Veniot's attempt to assist Mr. Patterson by testifying that he heard Mr. Patterson say "don't kick him." Again, he never made any mention of this when he had the opportunity to testify during the criminal trial. During that proceeding, Mr. Veniot was asked whether Mr. Patterson said anything to Mr. Chretien. The answer was "no." He, therefore, lied in these proceedings when he said otherwise. All of this lying, the employer argued, not to mention some of Mr. Veniot's other strike activities and post-strike conduct that was elaborated upon, made reinstatement impossible. The fact that Mr. Veniot claimed to be the victim, put in an untenable situation by the employer, demonstrated his complete lack of remorse and his abject failure to take responsibility for the events in question. This was not, the employer argued, a proper person or proper case for reinstatement.

In summary, the employer argued that all three grievors participated in the assault. That alone justified termination. All three grievors participated in the hunt for Mr. Chretien. All three grievors were untruthful and the authorities were clear – and a number of them were reviewed – that truthfulness is a keystone of the employment relationship. And none of the grievors had apologized for their roles – far from it. They all believed that they were the ones who were wronged; that they were the victims. Not a single grievor had demonstrated insight or accepted responsibility. Under no circumstances, the employer argued, should the grievors be reinstated. The employer asked that all three grievances be dismissed.

Union Argument

In the union's view, in many respects the facts were clear. There was a long and bitter strike. By January 2010, it had been going for months with no end in sight. The parties were not even meeting to discuss their situation. The employer was resuming operations and Mr. Chretien was crossing the picket line. This was known to the union, details were posted on its website. But there was no evidence, and the union emphasized this point, that the union or any of the grievors were involved with the vandalism of Mr. Chretien's car, or with the posters that were left on his and adjacent cars and posted in his apartment building. Mr. Chretien was, understandably, contacted by colleagues and union officials and asked to reconsider his position. There was nothing wrong with that. The union had nothing to do with the supporters Facebook page or with anything that appeared on it.

It was correct, of course, that the "boxed in" incident occurred adjacent to Mr. Chretien's apartment building. And it was also correct that Mr. Miller entered the lobby of that apartment building. But here too the facts were clear. Mr. French asked Mr. Miller if he wished to go for a ride to kill time. Mr. Miller agreed. At the time, Mr. Miller had a host of personal problems; he was estranged from his wife and was on the verge of losing his house. As Mr. Miller was describing his unfortunate circumstances, he noticed an apartment for rent. It was important to remember, the union pointed out, that Mr. Miller had, the previous month, notified the bank that he would be surrendering his house. It made sense in these circumstances that he would be looking for somewhere to live.

While Mr. Chretien and others had testified that there was no vacancy in the building at the time, the union urged me to accept Mr. Miller's evidence that he saw a for rent sign. That is why he asked Mr. French to stop his truck: to allow him the opportunity to go and investigate. There were a number of reasons for preferring the union's evidence. Joanne Reheault, for example, testified that there was no vacancy, but she failed to make mention of that in her written report. The landlord, in another example, could have been called to testify. An adverse inference should be drawn, the union argued, by the employer's failure to produce him. That left Mr. Chretien and his spouse. Mr. Chretien had a direct interest in the outcome of the proceedings. In all of these circumstances, in the union's submission, the evidence that it was a coincidence that Messrs. Miller and French ended up at the Chretien residence on the day of the "boxed in" incident should be, indeed, must be, accepted. The fact that Mr. Miller never followed up was immaterial.

While Mr. Miller was investigating the rental opportunity, Mr. French, the union argued, realized that he was being followed by AFI and so signaled to Mr. Miller. The evidence – reviewed by the union – about a poster supposedly being left behind in the lobby was hardly persuasive, and the union urged that it be disregarded. Why, for example, would Ms. Cumming not keep the poster? The reason, the union suggested, was because there was no poster to keep. Likewise, Mr. Landry claimed to have received a copy of the poster but when asked to produce it could not do so. There was, the union suggested, no poster.

More important, however, was the fact that it was Mr. French who contacted the police to notify them about AFI. It made no sense for Mr. French to call the police if he knew that he was at the residence of a key strikebreaking employee and was actually there for the purpose of posting posters. It also made no sense, having called the police to report having "boxed in" AFI, that a mere five days later Mr. French would go looking for Mr. Chretien if he knew that the "boxed in" incident took place adjacent to the Chretien residence. If Mr. French was engaged in something untoward, he would not have called the police. It was, the union argued, as simple and as straightforward as that. There was no evidence establishing that Mr. French knew he was at the Chretien residence. All of the evidence was to the exact opposite effect. These facts demonstrated the poverty of the employer's premeditation theory.

To be sure, the grievors, to varying degrees, knew that some employees, Mr. Chretien included, were crossing the picket line, none of them knew Mr. Chretien and none of them knew where he lived. None of the grievors knew his work schedule. None of the grievors knew that on January 19th he would be out for a run. None of them even knew that he was a jogger. In these circumstances, the encounter on January 19th could only be considered a coincidence. There was no factual basis for the employer's claim of premeditation, a claim it relied on to justify termination in its discharge letters. While Mr. French was convicted of assault, that did not mean that he went looking for Mr. Chretien with the intention of assaulting him. His evidence was that he did not. Mr. French's evidence was that he wanted to talk to Mr. Chretien about his actions and the effect of those actions on his colleagues and community with the intention of

persuading him to stop crossing the picket line. There was nothing wrong with that.

The employer's case, the union argued, rested on it establishing premeditation. It had failed to prove that somehow between leaving Pine Street, stopping at Cara's Convenience to pick up a sandwich, and then traveling to view the site of the "boxed in" incident, that the grievors had hatched a plan to find and assault Mr. Chretien. The employer had to prove this with clear, cogent and compelling evidence. In the union's view, and relying on a number of authorities that it reviewed, it had fallen far short of the legal burden that it had to meet.

The grievors were at Pine Street and had a meeting at nearby Brady Street. But it was important to remember that everyone was on strike. In these circumstances, meeting start times were, understandably, flexible. There was no sense in everyone driving themselves. Money was tight. Why would they go in separate vehicles? There was, to be sure, considerable conflict in the evidence about when exactly the grievors left Pine Street. In the union's view, Mr. Bertrand had to be mistaken about when he made his first call to Mr. Veniot. Mr. Bertrand was providing estimates about when the calls occurred. What was important was the content of those calls. And during the first call, Mr. Veniot told him that they were at Cara's Convenience. That was correct.

When they left Cara's Convenience, Messrs. Patterson and Veniot expected to go to Brady Street. Instead, Mr. French decided to show them the location of the "boxed in" incident. Neither Mr. Patterson nor Mr. Veniot asked Mr. French to

do this. In fact, both of them wished to get to the meeting. That did not matter, the union submitted. Mr. French was determined to show Messrs. Patterson and Veniot where he "boxed in" AFI. So they went to look at the location, following which they were driving north toward Mr. French's home and then Brady Street.

While Mr. French did not refer to visiting the location of the "boxed in" incident when he gave his January 19th statement to the police, that was, union counsel argued, hardly surprising. He was upset and stressed. He had never previously been in trouble with the law. Besides, viewing the location of the "boxed in" incident had nothing to do with the encounter with Mr. Chretien. Mr. French might have mentioned it in his chronology of events, but no adverse conclusions should be drawn because he neglected to do so. In any event, Mr. French noticed someone jogging and thought it might be Mr. Chretien. Messrs. Patterson and Veniot disagreed. Mr. French had pictures of "scabs" in his truck. He was, the union argued, a picket line coordinator and had an obligation to know who was "scabbing." That is why, thinking he saw Mr. Chretien, Mr. French decided to have a word with him. It was Mr. French's decision, and not one made in consultation with either Mr. Patterson or Mr. Veniot. That is why Mr. French turned his truck around and parked in front of where Mr. Chretien would end up jogging.

When Mr. French got out of the truck to have a discussion with Mr. French, he had no plan to assault him. He had had, as the union previously suggested, no expectation or anticipation of even seeing Mr. Chretien. It was entirely happenstance. Messrs. Patterson and Veniot had nothing to do with it. When Mr.

Chretien approached, Mr. French held out the poster with the picture and asked Mr. Chretien if the person in the picture was him. The incident then occurred. Mr. Chretien said, at some point, "Hey Mike" and "Fuck off, Mike." In the union's view, this actually made sense. Mr. Chretien had been informed about Mr. French's visit to his apartment building just a few days earlier. He knew what kind of truck Mr. French drove. While Mr. Chretien testified that all three grievors yelled at him, the union submitted that this was not correct. Any yelling was done by Mr. French alone. This was simply an unplanned altercation between Mr. French and Mr. Chretien, no more, no less.

There was, the union observed, a giant gulf between what actually happened and what the employer said occurred. The employer claimed in the discharge letters, that it was "evident" that there was "a premeditated effort to harass and intimidate" and that "a vicious and brutal" assault took place, neither of which was correct. The evidence was otherwise. Mr. Chretien went to a walk-in clinic. No treatment was administered. He was sent home and missed no work. The incident was not premeditated. It was not vicious and brutal. And it was not a "three on one" assault as claimed in its newspaper advertisement. To repeat, no one knew where Mr. Chretien lived, that he was a jogger, what jogging routes he ran and when he ran them, or what his work schedule was.

It was truly a coincidence that the grievors encountered Mr. Chretien on their way to Brady Street. There is no way that any of the grievors could have known, when they left Cara's Convenience, or at any other time, that Mr. Chretien was out for a run. The fact that Mr. French happened to be at Mr. Chretien's residence

a few days earlier – without knowing that is where Mr. Chretien lived – did not, and could not, establish that they knew where and when he would be jogging on January 19th. Simply put, there was no clear, cogent and compelling evidence – the evidentiary standard that had to be met – of any premeditation or plan to seek him out, as alleged by the employer and relied on by it in terminating the grievors.

The evidence, union counsel continued, was clear that neither Mr. Veniot nor Mr. Patterson knew that Mr. French was going to turn his truck around, or get out and assault Mr. Chretien. And neither of them, the union submitted, had anything whatsoever to do with that. Mr. French was acting entirely on his own. Indeed, because of a previous experience that took place when he was a youth, Mr. Patterson was especially alive to the consequences of mere presence at an event such as this. That is why Mr. Patterson said to Mr. French. "don't kick him." For his part, Mr. Veniot was busy on the telephone, and after sharing some observations in a calm and measured manner with Mr. Chretien about his decision to work during the strike, tried to the extent he could to deescalate the situation by redirecting Mr. French to his truck. Mr. French even tried to help Mr. Chretien up from the ground offering him a hand, an offer that was declined.

Indeed, after the encounter began, and on Mr. Chretien's own evidence, Messrs. Patterson and Veniot were at least eight feet away. Being far away and uninvolved, they were in the best situation to recount what had occurred. Their evidence was consistent: Messrs. Patterson and Veniot never called Mr. French a "fucking scab" or participated in the altercation in any way. After the incident,

Mr. French turned himself in. When interviewed by the police, he was understandably stressed and confused. This explained any inconsistencies in his evidence, and any arguable omissions such as failing to mention touring the location of the "boxed in" incident.

When the facts were fairly evaluated, and the employer held to its obligation of proving its case on the most strict civil standard, it was clear, the union submitted, that the assault was not premeditated, and that it was not, as the employer claimed in its termination letters, "vicious and brutal." It was akin to a momentary flare up. Mr. French had a long record of service, and there was nothing on that record that would suggest that he was violent or aggressive. What the record demonstrated was an excellent employee with long past service, and as importantly, the potential to render valuable future service. After his termination, Mr. French worked elsewhere and without incident alongside individuals who had crossed the picket line during the dispute. This spoke directly to Mr. French's rehabilitative potential, and a number of authorities were reviewed on point. Mr. French was an excellent candidate for progressive discipline, and it was progressive discipline, a suspension of six months, which was all that was justified in this particular case.

While a suspension was justified in the case of Mr. French, there was no justification for any discipline whatsoever in the cases of Messrs. Patterson and Veniot. With respect to Mr. Patterson, he was a long service employee with a perfect record. On January 18th he was appointed Treasurer of the local. He was in charge of the hardship committee. He was in the backseat of the car, obtaining

a ride to the Brady Street. Not only was there no evidence of premeditation on his part, there was no evidence of any untoward involvement in the incident at all. From experience, Mr. Patterson was conflict adverse and knew not to get involved in incidents of this kind.

With respect to Mr. Veniot, there was, again, no evidence of premeditation and the union urged acceptance of Mr. Veniot's account that he did not participate at all in the incident spending most of it on the telephone. When he got off of the call, he tried, in a calm and collected manner, to do what he could to bring the incident to an end, guiding Mr. French to his truck. Mr. Veniot had a long and distinguished career as a union officer and activist, and there was no reason to believe that he had been involved in the incident or that he would ever be involved in any similar type of incident in the future.

The overall context for the implementation of discipline also deserved mention and careful consideration. Underlying management's position was the continuation of its completely intransigent attitude and refusal to bargain with the union about the status of employees discharged during the strike. This attitude and approach eventually required the intervention of the OLRB, which, in due course, made a finding of bargaining in bad faith, and referred nine termination cases, including these three, to arbitration under the just cause standard. The evidence amply established that the decision to terminate was made in the belief – false as it turned out – that management would never be called upon to account and to justify why it was depriving three long service employees of their jobs. These were all facts worth bearing in mind.

Making a bad situation even worse, and putting everything else in question, was the complete inadequacy and questionable timing of the investigatory process and then the termination decisions. There was a rush to judgment, and an investigatory process that raised more questions that answers. Some of the information, for example, in the Peer Review Summary, was simply inaccurate. For example, Messrs. Patterson and Veniot were not charged with aggravated assault. Ms. Bagley could recall few details about who attended the termination meeting and what was said. Notes were not taken. The entire process was questionable with a result reached in two days in a process that normally rolls out over many weeks. There was cursory, at best, consideration of the impact of the decision on the grievors, of their long service, and of the other mitigating factors that should be considered in cases of this kind. In contrast, no adverse inference should be drawn, the union argued, from the grievors refusing to answer management's questions after the incident. They were on strike and had been criminally charged. They were instructed by criminal counsel not to answer any questions.

Union counsel pointed out that Mr. French has been punished by Justice Fitzgerald for what he did. Mr. French testified about the impact of the termination on him and his family, not to mention the other grievors. He had apologized to Mr. Chretien and could, in the union's submission, be successfully and fully reintegrated into the workplace. What had taken place was a momentary error in judgment, one not reflecting the real "Mike French." Mr. French never intended to cause Mr. Chretien harm. He was not a violent or

aggressive man. Nor were the other grievors. All three grievors could, and should be, returned to the workplace.

While the incident was serious, it was at the low end of incidents of this kind – and various authorities were extensively reviewed by union counsel – where arbitrators routinely reinstate grievors who have been involved in much more serious cases of workplace violence occurring during a labour dispute, and otherwise. The purposes of discipline in an industrial society had been vindicated. In any event, the prevailing weight of the authorities was clear, only in the most serious of all cases can termination be upheld, especially in circumstances like those present here where there was no risk of similar events ever reoccurring. The impulsive momentary flare up – inspired undoubtedly by Mr. French viewing smoke from the stack – that led to the incident was just that and would not be repeated. The purpose of discipline was to correct behaviour.

Moreover, Mr. French's rehabilitative potential had to be considered. The authorities – again reviewed by the union – were very clear about that. When they were, it was clear that this one incident was anomalous and should not, indeed, must not, stand in the way Mr. French returning to the workplace. With respect to Messrs. Patterson and Veniot, they had not even participated in the incident. They were innocent bystanders who did nothing to justify the employer's disciplinary response. They should be, must be, the union argued, reinstated and made whole.

Decision

Having carefully considered the evidence and arguments of the parties, I am of the view that the employer has established just cause for termination. The grievances are, accordingly, dismissed. Before turning, however, to the reasons for this decision, it is appropriate to canvass the legal landscape.

The Legal Landscape

There is no dispute between the parties that the employer had the obligation of proving its case with clear, cogent and compelling evidence on a balance of probabilities. A number of specific questions – the authorities make clear – are generally considered in cases of this kind. Who was attacked? Was it a momentary flare-up or premeditated? How serious was the incident? Was there any provocation? Is it a long- or short-service employee? Is there a disciplinary record? Are there mitigating factors that ought to be taken into account? Has there been an apology? Is there acceptance of responsibility? What are the prospects for rehabilitation? Was the grievor truthful in his or her evidence? Can this employment relationship be restored? (See, for example, *Dominion Glass v. United Glass & Ceramic Workers* 11 LAC (2d) 84 (Linden) where some of these factors are listed. More have been added as the case law has developed over time.)

The union referred to a number of awards where employees were terminated for workplace violence, including during a labour dispute, where there was premeditation and where the employees were, nevertheless, reinstated to employment. See, for example. *Atlantic Communication v. Technical Workers Union*

144 LAC (4th) 127 (Christie). The facts of *Atlantic Communication* were relatively straightforward. In the context of a bitter strike, the grievor went on to the property of one of the employer's contractors and assaulted him with a ball peen hammer. Arbitrator Christie found the grievor was untruthful in his evidence. Moreover, "I find that he walked across Reid's yard with the heavy ball peen hammer that is in evidence concealed in the sleeve of his jacket and intentionally struck Robby Reid with it, causing minor injury" (at para. 68.). The grievor, he concluded, acted with "malicious intent" (at para. 71).

In *Atlantic Communications*, Arbitrator Christie observed that "the fact that strikes and picketing predictably and understandably engender volatile emotions and hostility toward 'the other side', and those who ally themselves with them, may make illegal and violent behaviour understandable, but it cannot excuse legally unacceptable behaviour. Certainly it does not in any way justify a violent attack on anyone" (at para. 77). Nevertheless, Arbitrator Christie concluded even though the offence was not spur of the moment and probably premeditated, that it was the result of "strong emotional impulses." He noted that the discharge of the grievor was disproportionate to the discipline meted out in other instances – there were four other assaults committed by striking employees, but only the grievor was terminated – and may well have been intended to "send a message" (at para. 101). For all of these reasons, and others, the grievor was reinstated with a lengthy suspension. See also *Radio Shack v. USW* 26 LAC (2d) 227 (Beck) where the context of the incident was considered a major mitigating factor, *Canada Post v. CUPW* 1 LAC (4th) 156 (Thistle) and *Canada Post v. CUPW* 3 LAC (4th) 162 (Bird).

Various other authorities were advanced by the union dealing, more generally, with discipline for workplace violence and the appropriate penalty – not termination – to be applied. For example, in *Molson Breweries v. Canadian Union of Brewery & General Workers* 205 LAC (4th) 361 (Levinson), an employee with thirty years of service ("the first employee") concluded an argument with another employee ("the second employee") by hitting him in the face, which required twenty stitches to that employee's lip. The second employee was intoxicated and had provoked the assault with a racial threat. The first employee was terminated, the second employee received a twenty day suspension. The first employee was reinstated. Provocation and proportionality in the disciplinary response were among the factors underlying the arbitral award. Special reference was also made by the union to *National Steel Car v. United Steel, Paper& Forestry, Rubber, etc.* 214 LAC (4th) 370 (Craven) and *Hood Manufacturing v. CEP* [2013] OLAA No. 26 (Trachuk).

Without any doubt, violence, and threats of violence in the workplace, are, as they should be, taken extremely seriously, by the workplace parties, and by arbitrators reviewing disciplinary sanctions that are subsequently imposed. Not all acts of workplace violence, whether during a labour dispute or otherwise, are equally serious. But all acts of workplace violence must be taken seriously, thoroughly investigated and appropriately addressed. Principles of progressive discipline apply, and mitigating factors must be appropriately considered, all within the broad context of the governing case law that includes the proper consideration of the application of Bill 168. It is public policy in Ontario that

everyone be able to work without fear of violence or harassment. It is the law of the land that workplace violence and harassment will not be tolerated in Ontario.

One wonders if the authorities involving violence during a labour dispute relied on by the union would be similarly decided today. In any event, without exception, those cases are factually distinct and distinguishable. Indeed, even in one of the most extreme cases advanced by the union – *Atlantic Communication* – there appears to have been provocation (See para. 74, although there was never any admission or expression of remorse). Moreover, in that case, the arbitrator found the discipline to be disproportionate to that meted out to other individuals arising out of other incidents during that same labour dispute.

In general, arbitrators agree that the absence of a disciplinary record and long service alone are insufficient alone to mitigate against termination for serious workplace violence or threats of violence. (See, for example, *Metro Ontario v. CAW* 207 LAC (4th) 419 (Hinnegan) at 420). Some mitigating factors justifying a reduction of penalty in cases of workplace violence, especially provocation leading to a flare up, and expressions of apology and remorse, are, however, carefully considered:

> Perhaps the most common and critical factors to which arbitrators look when dealing with discipline imposed for violence in the workplace are "provocation" and "remorse." Provocation, or conduct or circumstances which cause a grievor to have a momentary flare-up, will often cause arbitrators to reduce the penalty of discharge. Similarly, a grievor who admits to his/her misconduct and tenders a sincere apology is more readily viewed by arbitrators as a candidate deserving of a second chance, and person who can be reinstated without undue concern that the misconduct will be repeated. *TNT Logistic v. USW* 118 LAC (4th) 109 (Davie) at 119.

Nevertheless, even impulsive and provoked acts of violence – flare ups – can and often will lead to termination, especially in the absence of expressions of genuine remorse. Termination is not the only penalty for workplace violence, but it is most probably the penalty especially in cases where there has been no provocation and no apology. It becomes almost inevitable where the incident is premeditated, a grievor has been untruthful in his or her evidence, and there is no apology.

To be sure, conduct must be judged and evidence assessed recognizing the realities of a strike or lockout and that includes the different circumstances in which the protagonists interact with each other. As noted in *Canada Post v. CUPW* (unreported decision of Thistle dated September 14, 1988): "The struggle that flows from a strike situation thus involves lawful rights on the part of both unions and employers. The essence of these rights is that, while employees may lawfully strike and peacefully picket to exert pressure to bring about a settlement, the employer has the right to continue its business, even to the extent of hiring replacement workers. It is not open to a union to use 'strong arm' tactics, intimidation or guerilla-like behaviour to dissuade an employer from its efforts to maintain its operation" (at 18).

Mr. Chretien was one of a number of bargaining unit employees who returned to work during the strike. Obviously, there was nothing wrong with the union contacting him and expressing, in very strong terms, the view that his actions were inappropriate and should be reconsidered. One would expect no less. One would even expect that harsh, but lawful, words and images might be used as

this view was forcefully communicated. After all, the union had a legitimate interest in discouraging bargaining unit members who decided to return to work, especially ones like Mr. Chretien whose skills and qualifications were integral to resumption of operations.

Even still, as pointed out in *BHP Billiton Diamonds v. Union of Northern Workers* 162 LAC (4th) 237 (Gordon): "a lawful strike does not give an employee who has chosen to support the strike license or justification to engage in assaults, threats, intimidation or other forms of forceful coercion against employees who make the opposite choice and continue to perform work, or against management; and, an employer has an ongoing obligation to maintain a workplace free of such influences" (at 271).

Grievances of Messrs. French, Patterson & Veniot

As is noted at the outset, and in the interlocutory award, Mr. French was convicted of assault, and the findings of the trial judge underlying that conviction are, of course, dispositive. The trial itself took place over two days in December 2010. Judgment was rendered on January 31, 2011.

To be sure, the trial judge, just like union counsel, observed that it was improbable that three men would attack another man in broad daylight: "Further, while it is highly unlikely that these three individuals would start a fight with Mr. Chretien, and I agree with Mr. Addario on that point, it is equally highly unlikely, perhaps even defying logic as Mr. Addario suggests, that the three of them, while on their way to a meeting, would stalk Mr. Chretien and

attack him in the afternoon on a busy street or in broad daylight. Community support is important to the Union cause and, as Mr. Addario submits, attacking a person would not help their standing in the community during a protracted battle with the company" (at pp. 10-11). That was not, however, the end of the matter:

> … there is no credible evidence to found a reasonable explanation as to why Mr. French stopped his vehicle on Southview Drive, particularly in the manner he did. The undisputed evidence is that a runner dressed in a toque, a jacket, jogging pants, running shoes and gloves, and wearing sunglasses is encountered by a vehicle being operated by Mr. French. Mr. French says "I saw the guy who I thought was Todd Chretien. I wasn't sure if he was so I wanted to see if he was crossing the picket line." The evidence is that Mr. French turned the truck around, drove the other way past the runner by about 200 feet, stopped the truck in a snow bank on the wrong side of the road, and left the truck with both doors open. Mr. French says he got out of the truck, held up the picture and asked if "he was this man Todd Chretien, but he just kept coming." Mr. Veniot who had turned to look at the runner coming says, "He ran right into Mike."
>
> Mr. Addario encourages me not to disbelieve Mr. French…The submission is that Mr. French is testifying for the first time and is "an unsophisticated witness, plainly an emotional man." The explanation I am urged to accept by counsel is that Mr. French drove by and he thought he recognized Mr. Chretien, he wasn't sure and he stopped because he thought he recognized him, which is what counsel took Mr. French to be trying to unsuccessfully articulate. My difficulty with Mr. French's explanation is not that it is presented by an unsophisticated, emotional, first time witness. Many witnesses would meet that description and their evidence may still be accepted and be accepted credible and reliable. That a witness may be testifying in court for the first time, may be an emotional person, or even extremely nervous, are all factors to be taken into consideration when assessing evidence. Considerations such as these may be real, but they are not determinative considerations in accepting or rejecting evidence. My difficulty with Mr. French's explanation is because there are several of them, they are different, and none of them makes any sense in the circumstances. Mr. French says, "I see a guy I think is Todd Chretien. I wasn't sure if it was. So I wanted to see if he was crossing the picket line." On cross-examination Mr. French said "I had no clue that Todd was crossing the picket line. I found out after the arrest." Further he says he believed that this conduct was ruining the city and other people's lives. "I wanted to find out if it was Todd and ask him why – why is he crossing the picket line."
>
> All this from a man who is driving two other Union leaders to a noon time planning meeting at a Union hall where other union representatives are waiting; a man who has taken an "out of the way" side trip, not only to get lunch, but to show the co-accused where he had an earlier encounter with company security; a man who meets a runner going in the opposite direction and, as the driver, immediately turns the vehicle around, drives past the runner and parks his vehicle in snow bank facing the wrong way, gets out of his vehicle without even bothering to close the doors, confronts the runner waving a photograph of him, which he's already had in his truck.

The pivotal word here is confronts. I am satisfied on all of the evidence that this was, indeed, a confrontation.

…

What is in issue is who started it, who threw the first punch, and not what happened during the altercation that developed.

…

Both Mr. Paterson and Mr. Veniot have articulated clearly their recollection of what they saw. What they didn't or couldn't see from their vantage point was the initial contact between Mr. French and Mr. Chretien…Only Mr. French and Mr. Chretien could give evidence of that initial contact between them.

…

My assessment of the evidence is that it is clear that Mr. Chretien was running and Mr. French was standing, and blocking the runner's way. Mr. French was intent on instigating a confrontation and therefore did not move out of the runner's way.

…

I am prepared to accept Mr. Chretien's evidence that Mr. French did attempt to kick Mr. Chretien….

…

I find the evidence of Ms. LaRush is corroborative of the confrontation description of the scene and goes to enhance the evidence of Mr. Chretien rather than that of Mr. French.

…

My concern here is with the initial contact and its instigation, and there is no evidence to establish that the initial contact and the instigation of the altercation was a punch thrown by Mr. Chretien.

…

An assault, as defined in the *Criminal Code of Canada*, involves the intentional application of force without consent from one person to the person of another.

The evidence establishes that Michael French committed an assault on Todd Chretien on or about the 19th day of January, 2010 as alleged (Reasons pp. 11-19).

Accordingly, and as a matter of law, Mr. French is guilty of assaulting Mr.

Chretien. There is no question, therefore, about responsibility and culpability.

Mr. French assaulted Mr. Chretien. What still must be determined, of course, in

the case of each of the grievors, is whether, on an evidentiary standard of clear, cogent and compelling evidence, there is just cause for termination. A review of the evidence, in the context of a consideration of the factors normally applied in cases of this kind, informs the conclusions that are reached. There is, necessarily, some overlap in the consideration of the relevant factors.

Was the assault premeditated? Was it a momentary flare up? Were the grievors truthful in their evidence?

In order to refute the employer's assertion that the assault was premeditated, the union argued that the evidence establishes that Mr. French did not know where Mr. Chretien lived, that his arrival at Mr. Chretien's apartment several days before the assault was happenstance, and that, moreover, the other grievors had no idea that the Chretien residence was adjacent to the location of the "boxed in" incident when they went to visit it. A number of points are made in support of these assertions, principally that it was Mr. French who contacted the police on January 14th, and why would he do that if he was at the Chretien residence for some covert purpose? And union counsel, like criminal counsel, also made the point that it made no sense that Mr. French would assault Mr. Chretien, or anyone else, in broad daylight, in anything other than a momentary flare up. Both points deserve attention, but ultimately, I cannot conclude that the January 14th visit to the Chretien residence was a coincidence; nor was the encounter with Mr. Chretien several days later on January 19th.

On January 14th, Messrs. French and Miller decided to go for a ride. Fair enough. They had time to kill. If their story began and ended there, it would be accepted.

But it does not and it is not. As they were driving around, they just happened to arrive at Mr. Chretien's apartment building – the residence of a strikebreaking employee who everyone knew was critical to the resumption of operations. Employees have a general sense of who does what. And in the case of Mr. Chretien any question about the role Mr. Chretien played was put to rest by the manner in which he was identified as an Acid Plant Operator on the union's website. It would require the complete suspension of disbelief to accept the accounts of Messrs. French and Miller that they just happened to arrive at his apartment. Their evidence is also predicated on there being an apartment for rent. The weight of the evidence is otherwise. Moreover, even though Mr. Miller was supposedly interested in the building, he never went back. In fact, he never looked for another apartment again, moving in with his girlfriend months later after surrendering his house. I cannot conclude that it was a coincidence that they ended up at the Chretien residence.

Union counsel asked why Mr. French would draw attention to his presence at the Chretien residence if he was engaged in anything untoward. That would be a fair question if his presence at the Chretien residence was undetected. But it was not. AFI was there with the means and resources to identify his truck, and him. Mr. French did not draw attention to himself by calling the police. His presence had already been established by AFI.

The evidence is clear that Mr. Miller entered the lobby holding a piece of paper. Everyone agrees about that. The evidence is also clear that when he exited the lobby he was no longer holding a piece of paper. The evidence is contested

whether a fresh poster was left behind, for if it was, it was not retained. On balance, I must conclude that the evidence of Ms. Cumming that a poster was left behind is to be preferred. Ms. Cumming has no reason to fabricate this. More importantly, however, Mr. Miller had no reason to enter the lobby, as he testified, with a piece of paper in his hand to write down rental information because there was no apartment to rent. Of all the apartments in Sudbury, he and the union would have me believe that he happened upon the one occupied by *the* critical returning to work employee. The same apartment building where that critical employee had had his car vandalized just one week prior.

It is noteworthy that Mr. Miller never bothered to pursue rental accommodations at any other apartment building at any other time following the "boxed in" incident. Messrs. French and Miller have provided an explanation for their presence at Mr. Chretien's apartment building but it is, in a word, preposterous. They were not out looking for apartments. Mr. French claimed at the criminal trial that he learned for the first time that Mr. Chretien lived at the location of the "boxed in" incident after January 19th. In fact, at the criminal trial, Mr. French testified that it was only after the "boxed in" incident, that he suspected that Mr. Chretien was a scab, and so he obtained a picture of him, all of this just a few days prior to January 19th. He was in the union hall and happened to pick one up. Prior to that, he testified, he had not looked at the union's website, or the union supporters' Facebook page.

However, the only reasonable explanation in the circumstances is that Messrs. French and Mr. Miller knew exactly where Mr. Chretien lived, that they drove

there with the purpose of placing another poster in his lobby, one that was identical to the poster placed on his and other cars, and in the lobby, when his car was vandalized one week earlier. The evidence establishes that once they got to the apartment, they realized that they were under observation and that they then came up with their untenable and unbelievable story about looking for rental accommodation for Mr. Miller. Calling the police did not bring attention to them. If AFI did not initially know exactly who they were, they had the means to quickly find out. I can only conclude that their account, from the beginning, when they went off on a "drive" to the end, is untrue. Mr. French did not testify truthfully about the "boxed in" incident in these proceedings.

Mr. French gave a statement to the police after he surrendered himself on January 19th. There are inconsistencies between that statement and the evidence tendered in these proceedings. For example, Mr. French told the police that after leaving Pine Street, he drove to the Tim's. All three grievors testified that this was not correct as that they had gone to Cara's Convenience instead. While the statement was given soon after the events in question, that minor inconsistency is insufficient to ground any adverse finding about credibility.

What does stand out, however, is what Mr. French, and the other grievors, had to say about why they did not leave Cara's Convenience and go to their scheduled meeting at Brady Street. That meeting was set to begin at 1.00 pm. It was an important meeting, called to discuss a disturbing development: resumption of smelting operations. They knew that Mr. Bertrand, and other union leaders, were waiting for them, and they knew that Mr. Bertrand did not have much time as he

had another appointment. But instead of proceeding directly to that meeting, on their account, they went to pick up some lunch, and they then traveled in the exact opposite direction so that Mr. French could show Messrs. Patterson and Veniot the location of the "boxed in" incident.

No mention was made of this when Mr. French was interviewed by the police on January 19th, hours after the assault. Indeed, no persuasive explanation has ever been given about why Mr. French was anywhere near 1288 Southview Drive – the location of the assault – when he was supposed to be some distance away for a 1.00 pm meeting at Brady Street.

In union counsel's submission, there was nothing fixed in stone about the start of the meeting. Employees were, after all, on strike and were not exactly pressed for time. That may, in general, be true, but on this particular occasion the evidence indicates otherwise. As Mr, French testified during his criminal trial: "…we had a 1:00 meeting at Brady Street…." Mr. French was at that time asked the following question in cross-examination: "And you're supposed to be going to a very big union meeting on Brady Street, right?" The answer was "Right."

The grievors were expected at 1.00 pm and, in fact, Mr. Bertrand called several times inquiring about their whereabouts when they did not arrive as scheduled. In these circumstances, the decision to go and view the site of the "boxed in" incident is cast, and must be viewed, in a much different light. The union suggested that Messrs. Patterson and Veniot were somewhat unwilling passengers on the trip to the "boxed in" incident, but the evidence supporting

that – comments they supposedly made to Mr. French, as they were driving around late for the meeting, are hardly persuasive. They were driving in the opposite direction of the meeting in order to see, well, nothing. The fact that Mr. Bertrand kept on calling Mr. Veniot – three times, Mr. Bertrand testified – to inquire where he was is further evidence that the meeting was supposed to start promptly at 1:00 pm. The grievors clearly knew as much, but instead, if their account is to be believed, traveled to Cara's Convenience and then decided to go and see the location of the "boxed in" incident, with a further planned stop at Mr. French's residence to use the washroom and pick up cigarettes.

A great deal of time and attention was spent during the hearing trying to determine when exactly the grievors left Pine Street, how long they spent at Cara's Convenience, and the time it would take to drive from here to there. There is no scenario in which all of these activities could have taken place given that the assault occurred just after 1:00 pm. Mr. Bertrand had no difficulty in leaving Pine Street around the same time as the grievors and getting to the meeting on time. Nor did, presumably, the other union leaders who were all there waiting for the grievors. Instead of going directly to the meeting, the start time which they knew, and which had long passed, they testified they went on an extended excursion and just happened to encounter Mr. Chretien. This encounter, the grievors describe, as another coincidence. I cannot accept this characterization.

Mr. French made no mention about taking the other grievors to see the location of the "boxed in" incident when interviewed by the police on the very day of the incident. This is troubling, far much more so than any confusion he might have

had about whether he stopped at Tim's or at Cara's Convenience. A mistake about the latter might be readily made, a failure to recollect the former, which provides the only justification for being in the vicinity of the Chretien residence, and proximate to where the assault took place, is much more fundamental. The three men were supposed to be at a meeting. On no version of their events can their various detours be explained for all of them make them late for attending this particular meeting which they knew was to start on time and which was especially important as the smoke from the stack made clear that the employer had succeeded in resuming smelting operations. This was something it could only do with the assistance of Acid Plant Operators like Mr. Chretien.

If Mr. Veniot is to be believed, at the very time he was at Cara's Convenience, he got a telephone call from Mr. Bertrand asking where he was. In Mr. Bertrand's words, he wanted to know, "where the fuck he was," but instead of immediately proceeding to the meeting, they went off to see the location of the "boxed in" incident. The only conclusion that can be reasonably arrived at in these circumstances is that the three men had an objective and plan in mind. It clearly did not involve their attending the meeting on time. Mr. Bertrand's evidence was clear and straightforward about when he made the calls.

Mr. Patterson testified that he saw the smoke from the stack while en route to (or from) Cara's Convenience and cursed it. Although he was expected at the meeting, the day after he assumed an important union executive position, he went with the other grievors to see the location of the "boxed in" incident. Why seeing that specific location, in contrast to hearing about it, would be of interest

to anyone is, frankly, impossible to understand especially when his presence, and that of the other grievors, was required to discuss matters of real moment.

On balance, one can only conclude from the weight of all of the evidence, assessed according to the strictest standard, that the visit to the location of the "boxed in" incident was contrived after the event in order to explain the grievors' presence near the Chretien residence and to undermine any assertion of premeditation. In fact, when all of the evidence is examined the only conclusion that can reasonably be drawn is that the grievors were not going to see the location of the "boxed in" incident, but were instead looking for Mr. Chretien. As Justice Fitzgerald found, Mr. French was "intent on instituting a confrontation."

There was much contested evidence about timing, but it is clear that the grievors were at Pine Street before 1:00 pm. It is clear that they were expected at Brady Street at 1:00 pm. And it is clear that the assault took place at just after 1:00 pm. Mr. Bertrand testified that he called Mr. Veniot at 1:10 to 1:15 pm. The reason he called him then was because the grievors were late and everyone was waiting. Mr. Veniot says that when he got this first call he was, and said this to Mr. Bertrand, at Cara's Convenience. Mr. Bertrand told them to hurry up to get to the meeting. Instead, they say they went to see the location of the "boxed in" incident in the exact opposite direction. Even though the grievors were late. Even though they knew they were late because Mr. Bertrand wanted to know where they were.

In those circumstances, the grievors should have proceeded directly to Brady Street. Mr. Veniot and the union suggested that Mr. Bertrand must be mistaken about when he made his various calls. But he was not mistaken. He would not have called before 1:00 pm because there would be no reason to call inquiring about their whereabouts before the meeting was scheduled to start. The only conclusion that can be drawn is that Mr. Veniot was not truthful about when the first call was received and where he was when he received it.

To repeat, the grievors were late, and getting later. But instead of asking Mr. French to hurry to Brady Street, they allowed him to drive in the opposite direction to show them the location of the "boxed in" incident, as if there was even something to see. Then, even more late at this point, when finally traveling toward Brady Street with another stop planned at Mr. French's residence, and not believing that the person Mr. French pointed to was Mr. Chretien, they raise no real objection to Mr. French turning his truck around and then traveling southward to bypass, stop and intercept Mr. Chretien. How Mr. French concluded that the jogger was Mr. Chretien from a distance – estimated by Mr. Veniot to be 200 feet – is questionable especially since Mr. Chretien was dressed in black, wore sunglasses and a black toque. Especially since Mr. French testified that he did not know Mr. Chretien in the sense of having never met him. All he had was his picture, a copy of which was introduced into evidence, and which could hardly form the basis for making an identification of someone that far away.

The union suggested that the meeting could have started any time given that everyone was on strike. That may have been the case for other meetings, but not this one. The grievors knew that it had to start on time as Mr. Bertrand had another engagement. They knew, if Mr. Veniot was to be believed about where they were when Mr. Bertrand's first telephone call came in, that they were late. Still, off they went to see the location of the "boxed in" incident. This explanation is at variance with the facts – they were late for a meeting – and at variance with common sense. Mr. French did not mention it when interviewed by the police on the day in question. It only emerged as an explanation a year or so later in the context of a criminal trial where the grievors, having decided to testify, attempted to explain their whereabouts on January 19th.

When asked in cross-examination why the grievors did not take the most direct route from Cara's Convenience to Brady Street, Mr. Patterson disagreed with the suggestion they had to travel there in any particular direction, "We can go anyway we want," he said. That is true, of course, but if one looks at the map, the only route that makes sense is hardly the out of the way one chosen by the grievors. They went towards Mr. Chretien's apartment after supposedly stopping at Cara's Convenience knowing that they would be late for an important meeting. On balance, none of the grievors were truthful in their evidence about the visit to the location of the "boxed in" incident. The evidence establishes that there was premeditation. There was nothing to see at the location of the "boxed in" incident. They had to be looking for someone.

Put somewhat differently, the assault, and the grievors' participation in it, cannot be characterized as a momentary flare up. In these circumstances, there was just cause for termination. The grievances can be dismissed on the basis of premeditation. And they can be dismissed on the basis of untruthfulness by all three grievors in their evidence about their activities prior to actual incident. The participation in the assault, while not as the employer described it in the termination letters as "vicious and brutal" was, as correctly described, "threatening and violent" and, independently, for the reasons that follow, justifies termination on a just cause standard.

What happened? Was there provocation? What role did Messrs. Patterson and Veniot play?

Mr. French, who, to repeat, was convicted of assault, maintains that all he wanted to do was have a conversation with Mr. Chretien to rationally dissuade him from picketing given the impact of that activity on his colleagues and his community. His actions indicate otherwise. His "spider senses" told him from some two hundred feet away that it was Mr. Chretien out jogging – even though he was dressed in black, wore sun glasses and black toque. While possible, this seems unlikely. More importantly, he turned his truck around, drove past Mr. Chretien, parked so as to impede Mr. Chretien's progress, exited the vehicle and leaving the door open, approached Mr. Chretien holding a piece of paper and assaulted him.

This assault was without provocation and, as noted above, Justice Fitzgerald concluded that Mr. French fully intended to do what he did. This was not a flare-

up. Mr. Chretien did nothing to invite it. The grievors testified that Mr. Chretien initiated it, but I accept Mr. Chretien's evidence – he was, after all, simply out for a run when he was approached, and it was three-on-one – is to be preferred. Likewise, Mr. Chretien's account of all of the grievors yelling at him rings true. While he was out for a run, a truck passes him, turns around, blocks him, men get out, and the union would have me believe that Mr. Chretien, in these circumstances, threw the first punch or in some way initiated the altercation? It is noteworthy that the grievors did nothing to discourage Mr. French. By yelling "fucking scab" at Mr. Chretien, they actually encouraged and egged him on.

In his evidence, Mr. Patterson testified that he "yelled" out "don't kick him." Significantly, Mr. Patterson never mentioned this when he testified in the criminal proceedings. Mr. Patterson was asked in chief during the criminal trial: "Did you say anything…? He replied, "No I did not." He was then asked: "Say anything during the entire incident?" The answer he gave was: "The only thing that I recalled saying was Todd had mentioned something about a three on one and I had said, 'It's not a three on one. It's a one on one.' I didn't even say it loud, I don't even know if he had heard [m]e but I kind of said it under my breath." Later on, during cross-examination, this evidence was repeated: "And you said nothing?" The answer given: "No, nothing." He was asked a follow up question: "Really?" The answer was "Absolutely." Mr. Patterson made it clear, however, that by that he meant that the only thing he said was his quiet comment about the incident not being three on one. He insisted that he never called Mr. Chretien a "scab."

At the criminal trial Mr. French was asked, "Did you hear Jason or Pat say anything…? The answer he gave was, "No, I never did." Later in cross-examination, Mr. French was asked, "Okay, so what's your answer, were they calling him a scab or you just don't know?" He replied, "I really don't know…Well, they weren't at that point, no." Mr. Veniot also testified at the criminal trial. He testified that he was on the telephone with Mr. Bertrand. The only thing he said to Mr. Chretien, was to calmly ask him to stop doing what he was doing. Mr. Veniot was asked: "Did Jason say anything?" The answer he gave, was "no." In these proceedings, Mr. Patterson testified otherwise, and his evidence about saying 'don't kick him," is not only self-serving, but unbelievable. It is inconceivable, having decided to testify in the criminal trial when he was facing serious criminal charges that Mr. Patterson would not tell the court about an exculpatory comment like this one.

The criminal trial was, of course, much closer in time to the events in question. At that time, Mr. Patterson was very clear about what he said, and it was in response to Mr. Chretien suggesting that it was three on one. Needless to say, this is not what Mr. Chretien recalls. His evidence, to recap, is that all three grievors repeatedly called him a "fucking scab." It is beyond nonsensical to accept any of the grievors evidence that they simply wished a conversation to ensue and that Mr. Chretien was, in fact, the author of the assault by taking the first swing or somehow provoking the incident.

Mr. French testified at the criminal trial that he was not the one to throw the first punch. The trial judge, after hearing evidence of Mr. Chretien, and an

eyewitness, found otherwise. This finding is dispositive: Mr. French assaulted Mr. Chretien. The union asked me to find the grievors credible – and by necessary implication, Mr. Chretien incredible. That is not a conclusion that I can reach. Mr. Chretien did nothing to provoke the assault. He may have been an object of union opprobrium, but he was exercising a legal right. And unlike the situation with the grievors, there is not even a hint in any of his testimony of it being tailored, contrived or otherwise spun. Unlike the situation with the grievors, there are *no* demonstrated examples of untruthfulness.

Mr. French's assertion that he felt it was inappropriate that he received a standing ovation after describing the incident at the union meeting is completely contradicted by almost all of his and the other evidence. Mr. French testified that he was not a "scab hunter," adding "I did not want to hunt this fucker down." Mr. Patterson recalled Mr. French's last words to Mr. Chretien, were "that's your last shift." Quite clearly, Mr. French was intent on delivering a lasting message to Mr. Chretien, and to anyone else thinking of crossing the picket line.

On the evidence, there was no provocation. This was planned. The grievors had no reason to be where they were unless they were out looking for Mr. Chretien. In describing their participation, the grievors were not truthful and, on balance, the only conclusion that can be fairly drawn is that not only did Mr. French physically and verbally assault Mr. Chretien, but that Messrs. Patterson and Veniot joined in with their verbal taunts. Mr. French was, even though he denied it, and in his words, on a "scab hunt" while the other grievors made a bad situation worse by yelling "fucking scab." Significantly, they did nothing to

interrupt or interfere with the physical assault. The specific participation of the three grievors, and their dishonesty in their evidence about it, justifies termination on a just cause standard.

How serious was the incident?

The incident involved a physical and verbal assault on an employee for exercising his legal right to return to work. While it did not result in any physical impairment, or lost time, it was perpetrated by members of the union leadership and was clearly intended to dissuade an individual from exercising his legal rights. It was a serious incident.

Is there a disciplinary record?

Messrs. Patterson and Veniot did not have a disciplinary record. Mr. French had a disciplinary record. His record was not referred to in the termination letter. In the case of Messrs. Patterson and Veniot, the absence of a disciplinary record should be considered as a mitigating factor. Given the other findings in this case, however, that factor cannot be given any weight. In the case of Mr. French, the employer was aware of his disciplinary record during the Peer Review Meeting but did not refer to it in the termination letter. However, even if Mr. French had no disciplinary record at all, that could not, in the circumstances of this case, given the findings that have been made, serve to mitigate the penalty. The absence of a disciplinary record, where there is premeditation and/or participation, and an absence of any apology or expression of remorse, will not generally be sufficient, by itself, to set aside a termination for serious workplace violence.

Has there been an apology or an expression of remorse?

Mr. French provided a court-ordered apology. He apologized for "what happened." He was "sorry I pulled my truck over." None of the other grievors have apologized and none of the grievors have accepted any responsibility at all for the events in question. They all seem to believe that Mr. Chretien was responsible for initiating the altercation. They are, as Mr. Veniot put it, the victims. Instead of apologizing, Mr. Veniot, remarkably, would like to have a conversation with Mr. Chretien. Clearly, he has the order reversed, but his view is self-evidently informed by his opinion that he is the one has been victimized by these events.

What are the prospects for rehabilitation? Can this employment relationship be restored? What other mitigating factors, like long service, should be considered?

The union argued that the events of January 19th represented an impulsive momentary flare up. For the reasons already given, I have concluded that there was premeditation. There was, the union argued, no basis to believe that these events would reoccur. However, that is far from clear given that none of the grievors have accepted full responsibility for their roles, none of them have apologized (in the case of Mr. French apologized appropriately) and all of them seem to think that they were the victims. This does not meet the criteria for demonstrating rehabilitative potential. Obviously, each of the grievors has been, and likely will continue to be, adversely affected by the terminations. Mr. French testified about his efforts to find other employment, usually far from home, and the impact of that on him and his family. But two years after the events in

question, Mr. French is still calling Mr. Chretien a "fucker." Mr. Veniot has suffered some financial losses and must now commute to Toronto to work. Mr. Patterson has suffered the least financially, although an adverse decision in these proceedings may have a financial/employment impact on him.

However, notwithstanding their lengthy service and the financial consequences, past, present and future, of the terminations, now most strongly felt by Mr. French, somewhat less so by Mr. Veniot, and hardly at all by Mr. Patterson, these mitigating factors are hardly a sufficient basis to interfere with the penalty given that Mr. French engaged in a physical and verbal assault, and Messrs. Patterson and Veniot engaged in a verbal assault. None of the grievors were truthful about their participation in the events under review. And even if for some reason the events of January 19th were found not to be premeditated, their actual participation in those events, as described in this award, without provocation, and without any subsequent acknowledgement and demonstration of remorse or accountability, justify maintaining the penalty. One can easily imagine a case arising out of a labour dispute where one employee calls another employee a "fucking scab." It would be hard to imagine circumstances in a labour dispute where that alone would constitute just cause for termination, or any discipline for that matter. But that is not this case. If it were, the outcome would be different.

In reaching the conclusion that there was just cause for termination, and no basis to interfere with the penalty, I am cognizant that the investigation of this incident was hardly textbook. There is an absolute appearance of a rush to justice. To be

sure, the management investigation into the incident was not problem-free. More time should been taken to ensure that all of the facts were assembled before the decision was made. The absence of notes, the factual mistakes, and the limited recollections of the two participants in the decision making process, are not confidence inspiring. The investigation could not fairly be described as following best practices. However, what really matters is whether there was just cause for termination, and I conclude that there was.

The newspaper advertisement was somewhat over the top. The incident was undoubtedly used by the employer to advance its case in the wider community. But as Mr. Veniot realized upon getting back into the truck after Mr. Chretien was assaulted, the incident put them in a compromising position. The advertisement does not, in any event, have anything to do with whether there was just cause for termination. As earlier noted, I do not fault the grievors, in the circumstances of this case, when they were on strike, and on the basis of legal advice, having been criminally charged, to not participate in the employer's investigation. There may, of course, be remedial consequences at some point but that is a different issue for another day.

On the other hand, I can only conclude, carefully examining the discharge letters, that the employer has demonstrated just cause for termination on the basis of premeditation and, independently, on the basis of participation in the assault. Given the complete absence of any acknowledgment or responsibility, any expression of genuine contrition, and dishonesty in these proceedings, it is hard to see how this could be an appropriate case for reduction of the penalty. The

grievors do have lengthy service. They also participated in (the case of Mr. French) a physical and verbal assault, and (in the case of Messrs. French, Patterson and Veniot) a verbal assault. Messrs. Patterson and Veniot did nothing to stop it, and they contributed to the physical assault by yelling out "fucking scab."

None of the grievors were forthright in their evidence. Far from it. In general, arbitrators do not reinstate where employees maintain, in effect, that they have done nothing wrong and refuse to take responsibility for their actions – even employees, like the grievors, with lengthy service. There is no basis in this case to interfere with the penalty just cause having been established. All of these factors militate against progressive discipline; namely, the reduction of the penalty. They certainly do not support the union's request in the cases of Messrs. Patterson and Veniot for setting aside the termination with no substitution of any other penalty and reinstatement with full compensation.

A few final observations. Before the incidents in question, Mr. Veniot was the author of a December 2, 2009 posting on the Strikeforce 6500 Facebook page. In that case, his language was inappropriate and threatening. The employer issued a disciplinary letter together with a final warning. It did not, however, rely on this misconduct to support the termination, and neither do I. After the strike, on February 3, 2012, Mr. Veniot sent an offensive, inflammatory and insulting email to the employer, and that too was introduced into evidence.

These communications are troubling. The union's efforts to contextualize them are far from persuasive. However, this case really stands or falls on any one of a number of findings: Was there premeditation? Was this a momentary flare up? Was there provocation? Who did or said what? Were the grievors honest in their evidence? Has there been an expression of regret or remorse? And is the penalty within the range, considering the events and findings in question and applying the well-accepted and normative criteria including mitigating factors? The offensive email and posting have nothing to do with the disposition and are only addressed because the employer sought to rely on them.

Conclusion

Accordingly, and for foregoing reasons, the grievances are dismissed.

DATED at Toronto this 20th day of September 2013.

"William Kaplan"

William Kaplan, Sole Arbitrator